

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BARRY CHOYCE,

Petitioner,

v.

No. CV 11-0450 JCH/GBW

FNU MARTIN, Warden, and
the ATTORNEY GENERAL OF
THE STATE OF NEW MEXICO,

Respondents.

**ORDER ADOPTING MAGISTRATE JUDGE'S
PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

The Magistrate Judge filed Proposed Findings and Recommended Disposition on October 4, 2011. *Doc. 9*. The proposed findings notify the parties of their ability to file objections and that failure to do so waives appellate review. *See id.* at 15; *see also Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010). To date, neither party has filed objections and there is nothing in the record indicating that the proposed findings were not delivered.

While Ground Two of Mr. Choyce's Petition has been exhausted, the claims asserted in Grounds One, Three, and Four have not. I hereby adopt the findings and recommendations of the Magistrate Judge on this matter.

Petitioner will be required to either (1) amend his federal petition to delete his

unexhausted ineffective assistance of counsel claims, or (2) elect to return to state court to present his unexhausted claims.


Should Mr. Choyce elect to delete his unexhausted claims, he will signify that deletion by a one-page document indicating that election. If Petitioner instead decides to return to state court to exhaust his unexhausted claims, his federal habeas petition will be dismissed. Petitioner should understand that, if he thereafter attempts to re-file a federal habeas petition, the one-year limitations period would be applied to all his claims, even those that are now exhausted and properly before this Court. *See Salazar v. Lemaster*, 130 F. App'x 208, 210 (10th Cir. 2005). Under this choice, therefore, it would be very likely that his entire second federal petition would be denied as time-barred.

Wherefore, **IT IS HEREBY ORDERED THAT:**

(1) The Magistrate Judge's Proposed Findings and Recommended Disposition (*Doc. 9*) is **ADOPTED**;

(2) Because Mr. Choyce presents this Court with a "mixed" petition, if he wishes to pursue his current Petition, he must file a one-page certification within thirty days of entry of this order stating that he has elected to delete Grounds One, Three and Four of his Petition;

(3) If Mr. Choyce fails to file a certificate to delete the unexhausted claims within thirty days of this order, he will be deemed to have elected to return to state court to present his unexhausted claims, and his Petition will be dismissed.


JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE